

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-438

In the Matter of:

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(West Palm Beach, Florida) RM-5894

MEMORANDUM OPINION AND ORDER

Adopted: November 12, 1991; Released: November 26, 1991

By the Chief, Policy and Rules Division:

1. The Commission has before it the Petition for Reconsideration filed by Guy Gannett Publishing Company ("Gannett"), licensee of Station WSSP, Channel 281C, Cocoa Beach, Florida, directed against the Report and Order in this proceeding, 3 FCC Rcd 5810 (1988). The Report and Order substituted Channel 282C for Channel 282C1 at West Palm Beach, Florida, and modified the license of Station WEAT-FM, Channel 282C1, West Palm Beach, Florida, to specify operation on Channel 282C. J.J. Taylor Companies, Inc. ("Taylor"), licensee of Station WEAT-FM, filed an Opposition to the Petition for Reconsideration, and Gannett filed a Reply. Subsequently, Gannett filed a Supplement to Petition for Reconsideration and a Motion to Accept. Taylor filed an Opposition to Motion to Accept and a Statement Concerning Supplement to Petition for Reconsideration.¹ Gannett filed a Reply to the Statement. For the reasons discussed below, we will grant the Motion to Accept Supplement and deny the Petition for Reconsideration.

BACKGROUND

2. This proceeding began with the filing of a petition for rule making by Taylor proposing the Channel 282C upgrade at Station WEAT-FM. In response to the Notice of Proposed Rule Making, 2 FCC Rcd 6325 (1987), proposing this upgrade, Gannett filed opposing comments. These comments contended that Channel 282C could not be used at West Palm Beach consistent with the Commission's minimum spacing requirements, FAA tower height restrictions, and the Commission requirement to provide West Palm Beach with a 70 dBu city grade coverage. Gannett also included an airspace analysis indicating that

the proposed transmitter site would have an adverse impact on air navigation. Taylor filed a report from another air space consultant indicating that there are potential transmitter sites extending 21 to 29 kilometers from West Palm Beach which should receive a favorable determination from the FAA with an antenna height 1049 feet AMSL. The Report and Order rejected Gannett's arguments and allotted Channel 282C to West Palm Beach with a 26.5 kilometer (16.5 mile) southwest site restriction. In that action, we concluded that Gannett had not shown that Taylor could not secure a transmitter site complying with Commission and FAA requirements, but only that it may be difficult to do so. The Report and Order also included footnote 2 which read as follows:

Our action is not intended to prejudice the merits of any waiver which petitioner may seek at the application stage. If petitioner is unable to find a suitable site or obtain any requested waiver, we will entertain requests for appropriate action, if any, at that time.

THE PLEADINGS

3. In its Petition for Reconsideration, Gannett specifically states that its reconsideration request is not based upon its "belief that no application complying with the Commission's technical rules can be submitted for Channel 282C at West Palm Beach." Rather, Gannett states that its "dispute" with the Report and Order concerns footnote 2 which, according to Gannett, attempts "to limit the remedies available" in the event a short-spaced application is filed for Channel 282C at West Palm Beach. In this regard, Gannett expresses its view that footnote 2 intimates that a denial of a short-spacing waiver is a prerequisite to revisiting the propriety of the Channel 282C allotment, which is in conflict with the decision in *Pinckneyville*, Illinois. 41 RR 2d 69 (1977).²

4. On September 5, 1989, Gannett filed a Supplement to Petition for Reconsideration and a Motion to Accept. As stated below, the Supplement concerns the application filed by Taylor to implement the Station WEAT-FM upgrade (File No. BPH-890802ID).³ This application proposed the existing WEAT-FM transmitter site which would not comply with applicable minimum spacing requirements. In support of a waiver request, Taylor stated that it had "searched diligently for a suitable site other than its existing site, but has been unable to find one." According to Gannett, this admission of the unavailability of a "suitable" transmitter site warrants deletion of the allotment.

¹ We will grant the Motion to Accept because the Supplement will enable us to resolve this proceeding on the basis of a complete record. We will also consider all other responsive pleadings thereto.

² In *Pinckneyville*, the Broadcast Bureau deleted a Channel 280A allotment because the proponent and applicant for the allotment failed to show that, at the time of the allotment, there

was a reasonable likelihood that a transmitter site would be available that would comply with Commission technical requirements. As such, the allotment rested on a "false premise" and was deleted.

³ This application was filed pursuant to the equivalent protection criteria of Section 73.215 of the Rules. Section 73.215 became effective on June 26, 1989.

DISCUSSION

5. After carefully considering the record in this proceeding, we believe that the basis set forth in the Report and Order for substituting Channel 282C for Channel 282C1 at West Palm Beach and modifying Station WEAT-FM's license to specify operation on Channel 282C was reasonable. In the Report and Order, we found that Gannett had not shown that Taylor will be unable to locate a site which would comply with the Commission's minimum distance separation requirements and also meet FAA air hazard concerns, but rather only that it may be difficult to do so. We noted that Gannett provided an in-depth analysis of potential air hazards at only one site but Taylor's showing, on the other hand, considered a number of possible areas in which a tower complying with FAA requirements could be located. Since the airspace consultants retained by Gannett and Taylor disagreed as to the availability of a site meeting FAA concerns, we followed our usual practice of deferring a determination as to the suitability of a transmitter site to the application stage when an actual site proposal is before the Commission. Accordingly, we substituted Channel 282C for Channel 282C1 at West Palm Beach because it appeared that there were theoretical sites which would meet both the minimum distance separation requirements and the city grade coverage rule.

6. We continue to believe that this approach is correct. Generally, in rule making proceedings to allot FM channels, there must be a theoretical site which meets the Commission's various technical rules.⁴ As long as such a site is shown to exist, we will typically presume at the allotment stage that it is theoretically available and will utilize it as a basis for making allotments. We will, however, take into account a showing by a party that, in reality, no theoretical sites exist because of environmental, air hazard, or other similar considerations.⁵ In this case, Gannett did not make such a showing. While Gannett questioned the use of a particular site, it did not rebut Taylor's allegations that there were two other sites theoretically available for a Class C station at West Palm Beach. Under these circumstances, we believe that it was reasonable at the time that we made the allotment to rely upon Taylor's showing that there were other sites that were theoretically available.

7. Even if subsequent events cast doubt upon our reliance on Taylor's engineering and airspace reports, Commission precedent permits an allotment to stand if that reliance was reasonable at the time the allotment decision was originally made. For example, in *San Clemente, California*, 3 FCC Rcd 6728 (1988), appeal dismissed, 884 F.2d 1462 (D.C. Cir. 1989), the Commission allotted a Class A FM channel to San Clemente, California, even though the only theoretical sites which would meet our technical rules were located on a military base. Although there were conflicting submissions by the parties concerning the availability of these sites, we made the allotment based

upon the representation of a military official that there was no outright proscription on broadcast towers being located on this base and erection of a 300-foot tower would be considered consistent with overriding military uses. Even though the military base subsequently declined to permit the proposed tower construction, we affirmed the allotment and denied a petition for reconsideration because it was reasonable at the time to have relied upon the petitioner's showing.⁶

8. We believe that a similar result is warranted here. Although Taylor subsequently filed an application to upgrade channels at its existing site rather than those specified by its airspace consultant and indicated that it had diligently searched and was unable to find another site, we do not believe that this warrants deletion of the allotment. As in *San Clemente*, we believe that it was reasonable to rely upon Taylor's engineering and airspace showings because Gannett had not entirely rebutted all of the theoretical sites proposed by Taylor. Moreover, the fact that Taylor filed an application to use its existing site and provide equivalent protection to Gannett's station at Cocoa Beach under Section 73.215 of the Rules does not change this result because it is permitted to select any site that complies with the Commission's technical rules at the application stage.

9. As a final matter, we disagree with Gannett's contention that footnote 2 of the Report and Order limited its remedies under *Pinckneyville*, supra, because it must await action on any waiver request filed in an application to implement the upgrade before challenging the actual upgrade. On the contrary, footnote 2 did not restrict the rights of Gannett or any interested party to file a petition for reconsideration of the allotment or pursue any other remedy. Indeed, we have dealt with all the arguments raised by Gannett regarding whether the allotment should have been deleted.⁷

10. Accordingly, IT IS ORDERED, That the aforementioned Motion to Accept the Supplement to the Petition for Reconsideration filed by Guy Gannett Publishing Company IS GRANTED.

11. IT IS FURTHER ORDERED, That the aforementioned Petition for Reconsideration and Supplement to Petition for Reconsideration filed by Guy Gannett Publishing Company ARE DENIED.

12. IT IS FURTHER ORDERED, That the aforementioned Petition for Rule Making and Order to Show Cause filed by Guy Gannett Publishing Company IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

⁴ See, e.g., *Randolph and Brandon, VT*, 6 FCC Rcd 1760, 1764 n. 4 (1991); see also *Key West, Florida*, 3 FCC Rcd 6423 (1988).

⁵ *Id.*

⁶ Likewise, in *Pinckneyville*, we specifically stated that even if an applicant for the allotment were forced to specify a site not in compliance with the Commission's minimum spacing requirements, this does not cast doubt on the underlying allotment if there had been a reasonable basis for determining that a site would be available. See 41 RR 2d at 71-72.

⁷ In a related vein, Gannett has also filed on September 6, 1989, a "Petition for Rule Making and Order to Show Cause." That Petition requests the substitution of Channel 282C1 for Channel 282C at West Palm Beach, and modification of the Station WEAT-FM license to specify operation on Channel 282C1. Gannett has advanced the same arguments in support of that Petition and in the Supplement in this proceeding. For the reasons discussed above, we are also dismissing the Petition for Rule Making and Order to Show Cause.